BRITISH COLUMBIA

Employment Standards Tribunal
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February 24, 1997 BC EST No. D086/97

To Interested Parties

Dear Sirs/Mesdames:

Re Employment Standards Act – Part 13
Appeal of Director's Determination 002624
46127 BC Ltd. Operating Bel-Air Taxi, Coquitlam Taxi and
Port Coquitlam Taxi - and - Thomas Lunde
Tribunal File Number: 96/406

DECISION

This case involves an appeal by 467127 B.C. Ltd. (operating as Bel-Air Taxi, Coquitlam Taxi and Port Coquitlam Taxi) against a Determination that the complainant, Thomas Lunde, is an employee and entitled to payment in the amount of $6,459.49. The Tribunal held a case management hearing with the parties on December 13, 1996. The substantive hearing will be held on March 4, 1997.

At the case management hearing, Mr. Albright, counsel for 467127 B.C. Ltd. ("the Company") informed the Tribunal that the Company would be proceeding with its appeal solely on the issue of quantum. The issue of the complainant's employment status has therefore been resolved by the Determination, in which he was found to be an employee of the Company. At the same meeting, the Tribunal made orders for the production of records in the possession of the Company. One of those orders, which went by agreement between the parties, required the Company to produce what was described as "computer log-on data pertinent to the complainant's complaint" covering the period April 1994 - October 1995. The Tribunal rejected the complainant's request for a more broadly based order which would have included periods outside the scope of the Determination.

Subsequently, the parties have brought the matter back to the Tribunal for clarification. I was delegated by the panel to hear and determine the procedural issues which arose between the parties. For that purpose, I conducted a telephone conference discussion with the parties on February 13, 1997.

THE SUBMISSIONS

Mr. Albright informed the Tribunal that his client had put in place a new computer system since the dates covered in the Order. The data which was the subject of the Tribunal's order for production now resides on computer tapes which are not compatible with and cannot be processed by the new system. For the Company to provide records in written form will require conversion of the data on the tapes. The Company has learned from a computer service contractor that this will cost approximately $2,000.00. While the Company is prepared to provide the other parties with a copy of the tapes on which the data resides, it is not prepared to pay the costs of converting that data into documentary form.

It is the Company's position that the Tribunal's order for the production of computer log-on data did not and could not obligate the Company to have the data converted from machine-readable form to documentary form. This, submitted counsel, would be tantamount to requiring the Company to produce a document which does not exist. This is beyond the jurisdiction of the Tribunal: c/f the Supreme Court Rules, s. 26. In addition, where documents are produced in the context of a demand for production of documents, the opposing party must bear the out-of-pocket costs of the other party: see British Columbia Building Corporation et al vs. T & N et al (1995) 39 C.P.C. (3d) 313 (BCSC).

Ms. Adamic, counsel for the Director, argued that this is a proceeding under the Employment Standards Act (the "Act"), not a proceeding in the Supreme Court. It was her position that under a remedial statute such as the Act, an order for costs related to the production of documents is not granted unless the statute specifically so provides. The subject records were originally in paper form and it was the Company's choice to have them preserved solely in machine-readable form; it cannot use this as a protection against an order of the Tribunal for the production of documents. Further, Section 28 of the Act requires the Company to maintain payroll records in English and it has failed to do so. These records include (28(1)(d)):

"the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis . . ."

While the computer log-in data may be a poor substitute for payroll records, they were properly ordered by the Tribunal and must be produced in English.

Mr. Albright replied that the issue of the Company's failure to maintain records is not before this Tribunal and must be addressed in other proceedings. The computer log-on records are not, he said, payroll records within the meaning of Section 28 of the Act.

ISSUE

The issue for my decision is whether the Tribunal's earlier order that the Company produce computer log-on data will be satisfied by the Company providing the raw data tapes to the other parties.

DECISION

It is my decision that the Company will not satisfy the Tribunal's order by merely providing the raw data tapes to the other parties. It was implicit in the Tribunal's earlier Order that the Company must produce computer log-on data in a form which will permit the other parties to this proceeding, and the Tribunal itself, to read the data. This will apparently require the Company to have the data converted at a cost of $2,000.00, but it is the decision of this Tribunal that this is a cost which it must bear in order to comply with the Order.

I accept that the Company's arguments were not frivolous. Were this a court proceeding under the Rules of Court, then the Company would normally be entitled to look to the other parties to cover its reasonable costs of complying with the Order: British Columbia Building Corporation et al, supra. This may take the form of paying for a copy of the machine-readable data (or, in the BCBC case, microfilm) or paying for the reasonable photocopying costs in the case of the production of paper-based documentation. However, this is not a court proceeding. Under the Act, there is no similar rule. It is the practice that the parties required by the Act to provide documents or records do so at their own cost. Like any rule of general application, it may permit exceptions in compelling circumstances. However, no such circumstances exist here.

It is important to focus on the issue in this particular dispute. Were this a simple matter of providing the paper-based records, there would be no controversy. The Company did not take the position in the earlier proceedings that it was seeking its costs of providing photocopies of the requested documentation. It was only when the Company discovered that its records could not be readily converted to paper-based form without unexpected expense that it brought this matter back before the Tribunal for its consideration. The unexpected expense arose because the Company had changed its computer system and the new system was not compatible with the previous one, at least in so far as data storage and retrieval is concerned.

In view of this, the significant issue raised by the Company was whether an order, the effect of which required it to convert data to documentary form, required it to "create a document" or, put differently, produce a document which did not already exist. In my view, the Tribunal's Order does not have this effect. The documents which are the subject of the Order originally existed in documentary form and were converted by the Company for archival purposes to machine-readable form. Storage of documents (or the their significant data) in this manner is not unusual. The Tribunal's Order simply requires the Company to provide the information which is on the data tapes in a form which can be read by the parties. It does not require the Company to create a new form of document but merely to return the data to its original form, or at least to a form that provides the same information.

The Director's argument based on s. 28 of the Act provides further support for this judgment. The Company is obligated by S. 28 to maintain payroll records in English. It has not done so. There is no doubt that this obligation puts an employer to expense, but this is an expense it must bear in order to comply with the Act. Prior to this litigation, the Company believed that the complainant was a contractor and so it did not keep such records. However, its abandonment of the appeal on the ground of the complainant's employee status puts this issue behind it. Had the Company maintained payroll records as required, there would be no question of whether the Director or the complainant must be put to expense in securing the information to which they are entitled under the Act. The data which is now sought is presumably less useful data than the Company was required to maintain, but the Director and complainant argue that it may be the best evidence still available of the complainant's hours of work. I do not see how the Company can logically resist an application to provide this data without expense to the other parties when the costs of doing so are only present because of its failure to keep the required

records. In short, but for the Company's failure to comply with s. 28, it would not have been required to convert data from machine-readable to documentary form in this case.

On a review of the Act, I am satisfied that the Tribunal has the jurisdiction to make this Order in the form which I have now clarified. Under s. 109 of the Act, the Tribunal has the power, among others, to:

(e) inspect any records that may be relevant to an appeal, reconsideration or recommendation,
.
(g) require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made under oath or affirmation, and

(h) order a person to produce, or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e).

Even if these provisions did not implicitly require the Company's records to be produced in documentary form, the Tribunal would clearly be within its rights to order the Company to produce its computer tapes at the upcoming hearing (s. 109 (h)). In order to make such an Order meaningful, the Company would be required to bring with the tapes such technology as might be required in order to review them. This would be costly for the Company and wasteful of hearing time. Instead, the Tribunal is requiring the Company to disclose this information "in writing" (s. 109 ((g)) in order to avoid such a negative impact on the hearing. It is implicit that the "writing" take the form of English writing rather than binary code.

As a concluding comment, it is not at all clear to me that the Tribunal's Order will ultimately put the Company to any greater expense that it might otherwise incur in the course of this appeal. The Company bears the burden of establishing that the Director's decision regarding quantum is incorrect. If it has records within its possession which refute the Director's Determination, then it would be expected to produce them in evidence. As it appears, this will require it to convert data from data tapes to documentary form, as the relevant records were converted to tape under its former computer system.

This concludes my decision on the matters raised in the telephone conference of February 13, 1997.

Yours truly,

John L. McConchie, Adjudicator
Employment Standards Tribunal

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